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Supreme Court, U.S.
FILED
JUN 16 2004
OFFICE OF THE CLERK

No. 03-1427

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,
Petitioners,

v.

RJR NABISCO, INC., *et al.*,
Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,
Petitioners,

v.

PHILIP MORRIS USA INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Revenue Rule, which bars a foreign government from directly or indirectly enforcing its revenue laws in the courts of another country, precludes these suits by foreign governments to obtain injunctive relief designed to enforce foreign revenue laws in U.S. courts.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and RJR Acquisition Corp. have the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. Invesco Asset Management Limited, and Capital Research and Management own 10% or more of R.J. Reynolds Tobacco Holdings, Inc., stock.

With respect to Respondents British American Tobacco (Investments) Limited, British American Tobacco (South America) Limited, B.A.T Industries p.l.c., BATUS Tobacco Services, LLC, and Brown & Williamson Tobacco, no publicly held company directly owns 10% or more of the stock of any of the Respondents, but 10% or more of each of their stock is indirectly held by British American Tobacco p.l.c., which is a publicly held company. In addition, the Respondents' parent corporations that are not Respondents are: British American Tobacco p.l.c., British American Tobacco (1998) Limited, British American Tobacco (Holdings) Limited, Louisville Securities Limited, BATUS Holdings, Inc. and BATIC, Inc.[1]

Respondent Altria Group, Inc., f/k/a Philip Morris Companies Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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1. B.A.T Industries p.l.c., British American Tobacco (South America) Ltd., and BATUS Tobacco Services, LLC, join this Opposition subject to, and without waiver of, their defenses including the lack of personal jurisdiction.

Respondents Philip Morris USA Inc., f/k/a Philip Morris Incorporated, and Philip Morris International Inc., have the following parent corporation: Altria Group, Inc. No other publicly held company owns 10% or more of their stock.

Respondents Philip Morris Products Inc. and Philip Morris Duty Free Inc. have the following parent corporation: Philip Morris International Inc. No other publicly held company owns 10% or more of their stock.

Respondent Philip Morris Latin America Sales Corporation has the following parent corporation: Philip Morris LA Holding Inc., f/k/a Philip Morris Latin America Inc. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

The United States Court of Appeals for the Second Circuit held below that the long-standing Revenue Rule barred these civil suits by various foreign governments to collect foreign taxes and obtain related relief in U.S. courts. App. 30a. That ruling is consistent with more than 200 years of case law from around the world and with every state and federal decision in this country, including two circuit decisions addressing the exact issues presented here. *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1075 (2004); *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). The Court denied certiorari in both of these prior cases. *See Republic of Honduras*, 124 S. Ct. 1075; *Attorney Gen. of Can.*, 537 U.S. 1000. Nothing has changed since the Court denied certiorari in *Canada* and *Honduras* that warrants the Court's review here.

In *Canada*, the United States – in a joint submission by the Solicitor General, the Department of State, and the Department of Treasury – also agreed that the Revenue Rule barred such suits and urged the Court to deny certiorari. *See* Brief of the United States As Amicus Curiae at 9, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01-1317) (opposing certiorari). The United States recognized that the Revenue Rule is compelled by important separation of powers concerns: the decision whether, when, and how to allow a foreign government to enforce its tax laws in U.S. courts is a matter for the political branches to define through treaty. *Id.* The Rule prevents a foreign government from circumventing the treaty process and obtaining greater assistance than it

has negotiated for and greater assistance than the United States would receive in foreign courts. Allowing these claims would impermissibly interfere with the political branches' foreign policy and treaty making authority. *See id.* at 10.

In view of the unanimity of the circuits, the United States's approval of these decisions, and the Court's two prior denials of certiorari, this case clearly is unworthy of review, and it is therefore not surprising that petitioners do not ask for a grant of review in the first instance. Instead, petitioners ask the Court to hold this case pending its decision in *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 1875 (2004). However, a decision to hold would be unwarranted because that case involves the application of the Revenue Rule to a federal *criminal* prosecution, which does not raise the same separation of powers concerns. In a federal criminal prosecution, the Executive Branch itself can assess any foreign policy implications in determining whether or not to prosecute. No such opportunity exists in a civil case brought by a foreign government.

Not one U.S. court has allowed a civil suit like this one to proceed. The United States agrees that suits like this one should not proceed. The parties in *Pasquantino* agree that the Revenue Rule applies in the civil context, and that suits like this one should not proceed. Even the *Pasquantino* court was careful to acknowledge that its ruling refusing to apply the Revenue Rule applied only in the criminal context and suggested that the Rule should apply to a civil suit brought by a foreign government seeking to vindicate foreign tax laws. *See Pasquantino*, 336 F.3d at 331. The issue presented here is simply not at issue in *Pasquantino*. There is no reason

for the Court to revisit the Revenue Rule in this civil context or to hold the petition in light of *Pasquantino*, as petitioners request. Pet. at 8.

STATEMENT OF THE CASE

I. These Actions Involve Efforts By Foreign Governments To Enforce Their Revenue Laws In U.S. Courts

In these consolidated lawsuits, several Departments of the Republic of Colombia ("Colombian Departments"), the European Community ("EC"), and ten of the EC's member states ("Member States") sought to recover unpaid foreign taxes and obtain related relief arising from alleged cigarette smuggling schemes in various foreign lands.[2] Petitioners alleged, among other things, that the respondent companies facilitated the smuggling of cigarettes illegally into their countries. App. 6a-7a.

In their complaints, petitioners sought principally to recover taxes allegedly lost by reason of the alleged schemes. App. 8a. Specifically, petitioners sought to recover as damages (1) "excise taxes that would have been paid on the

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2. In July 2001, the district court dismissed the EC's original action, holding that the EC lacked standing to bring its tax-based claims under RICO. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001). Three weeks later, the EC filed a second complaint, virtually identical to the first, seeking the same tax-related losses and injunctive relief. In this second complaint, ten of the EC's Member States joined the suit, asserting identical claims. App. 8a-9a. Five of the EC's (then-fifteen) Member States – Austria, Denmark, Ireland, Sweden and the United Kingdom – did not join the lawsuit.

cigarettes in question absent the wrongful activities of the Defendants"; (2) "[c]ustoms duties"; (3) "[v]alue-added tax levied on cigarettes"; and (4) derivative costs such as law enforcement and other governmental expenses incurred "to fight against cigarette smuggling." A-409-11; *accord* A-2021-26.[3] Petitioners sued under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1996) and brought supplemental state common law claims.

In this Court, however, petitioners wholly ignore their RICO claims and their claims for damages, apparently recognizing that those claims are barred by the Revenue Rule. Instead, they premise their entire case on state common law torts based on diversity jurisdiction and purport to seek only equitable relief. *See* Pet. at 2-4.[4]

II. Courts Uniformly Have Rejected Identical Suits By Canada and Other Countries

While these consolidated actions were pending in the district court, the Second Circuit decided *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). There, Canada filed a civil RICO and state common law action in

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3. In this brief, "A" refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

4. Diversity jurisdiction, however, is lacking in the Colombian Departments' action because there is no complete diversity – there are foreign parties on both sides of the case. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1923 (2004) (diversity is absent where "aliens [are] on both sides of the case") (citing *Mossman v. Higginson*, 4 U.S. 12, 14 (1800)).

the Northern District of New York, based on alleged tax-related injuries resulting from a cigarette smuggling scheme. *Id.* at 106. Like petitioners here, Canada sought to recover unpaid taxes and requested injunctive relief designed to enforce its tax laws. *Id.*

The Second Circuit held that the Revenue Rule – a "longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated claims of other sovereigns" – barred all of Canada's claims, including those for injunctive relief. *Id.* at 109. The court explained that the Revenue Rule is grounded on constitutional principles of separation of powers: "When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to – and better handled by – the political branches of government." *Id.* at 114.

Reviewing U.S. policy on tax assistance treaties stretching back to the 1930's, the Second Circuit concluded that "the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119. The Court of Appeals determined that, by filing the civil suit, the government of Canada was seeking a form of foreign tax collection assistance that it had been denied by treaty. If the suit were allowed, it would completely nullify the limits on such assistance as negotiated and imposed by the political branches of government in the U.S.-Canadian tax treaty. *Id.* at 122. In essence, to allow the suit "would potentially allow Canada to obtain assistance it has not negotiated for and that would be greater than the

assistance our government would likely receive as a litigant in Canada's courts." *Id.* Accordingly, the court affirmed the dismissal of Canada's claims, cautioning that "courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices." *Id.* at 120.

Canada subsequently filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. On behalf of the United States, the Solicitor General – in a joint submission with the Departments of State and Treasury – opposed the granting of certiorari and supported the Second Circuit's application of the Revenue Rule based on "important separation-of-powers interests." Brief of the United States As Amicus Curiae at 6, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01-1317) ("U.S. *Amicus* Br."). The Court ultimately denied certiorari. *Attorney Gen. of Can.*, 537 U.S. 1000.

Following the filing of the *Canada* case, various Latin American countries brought identical actions in the Southern District of Florida. Like the Second Circuit, the Eleventh Circuit affirmed the dismissal of these suits based on the Revenue Rule. *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003). Plaintiffs there also filed a petition for a writ of certiorari, which the Court denied. *Republic of Honduras v. Philip Morris Cos.*, 124 S. Ct. 1075 (2004).

III. The Proceedings Below

A. The District Court's Decision Below

Following the Second Circuit's decision in *Canada*, the district court dismissed petitioners' complaints based on the Revenue Rule. App. 42a. The court specifically considered the Revenue Rule's application to claims for injunctive relief. App. 43a. Noting that petitioners' requested injunctive relief was "designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling," the court determined that this relief also triggered the Revenue Rule. App. 43a. As with claims for damages, the court "'would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants.'" App. 42a (quoting *Attorney Gen. of Can.*, 268 F.3d at 133).

Consequently, the district court dismissed with prejudice petitioners' RICO and common law claims predicated on smuggling. App. 61a.[5] Petitioners appealed the dismissal to the Second Circuit.

B. The Second Circuit's Decision Below

The Second Circuit affirmed the dismissal of the present cases. App. 30a. The court found that petitioners' allegations were "markedly similar to those at issue in *Canada*." App. 15a. Like Canada, the court noted, petitioners premised

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5. Finding no causal connection to the alleged harm when stripped from the context of the smuggling claims, the district court dismissed petitioners' "money laundering" claims without prejudice. App. 55a-57a, 64a. Petitioners subsequently have refiled those claims against certain defendants.

their complaints on various tax-related injuries. App. 15a. Accordingly, the court found its decision controlled by *Canada*. App. 16a.

The Second Circuit rejected petitioners' argument that the foreign policy concerns underlying the Revenue Rule were not implicated in this case. App. 15a-16a. *First*, the court reiterated that enforcement of foreign tax laws is a question of "'foreign relations policy . . . assigned to – and better handled by – the political branches of government.'" App. 13a (quoting *Attorney Gen. of Can.*, 268 F.3d at 123). Thus, "the modern revenue rule is rooted in both our perception that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches." App. 14a. The court rejected petitioners' reliance on various non-tax treaties such as the Vienna Convention and Palermo Convention. App. 24a n.7. Instead, like the Eleventh Circuit, the court found that the over 50 tax treaties between the United States and other nations "reflected the political branches' continuing recognition of the revenue rule." App. 14a.

Second, the court rejected petitioners' argument that their claims for injunctive relief fell beyond the scope of the Revenue Rule. The court found that the same separation of powers problems arise irrespective of whether the remedy sought is damages or injunctive relief:

> [T]he requested injunctions would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages, as plaintiffs would have the court order the defendants to cease their smuggling operations,

> disgorge their profits, and put into place measures that would allow foreign customs officials to ensure that they are complying with those nations' revenue laws. Thus, the requested relief, though different in form, has the same implications as plaintiffs' claims for damages, and is barred by the revenue rule.

App. 27a. Accordingly, the court concluded that petitioners' claims for injunctive relief "would require the court to evaluate and interpret foreign tax laws" and were therefore barred by the Revenue Rule. App. 27a.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Application Of The Revenue Rule Creates No Conflict Warranting The Court's Review

A. There Is No Conflict On The Revenue Rule's Application To Civil Suits By Foreign Governments

The decision below does not conflict with a decision of this Court, any Court of Appeals, or for that matter, any court anywhere in the world. Both the Second Circuit and Eleventh Circuit have now squarely considered the Revenue Rule's application to civil suits to recover taxes, and both have reached the same conclusion: as a matter of foreign relations and separation of powers, civil actions by foreign governments seeking to enforce their revenue laws, directly or indirectly, in U.S. courts are barred by the Revenue Rule. That includes not only actions seeking to collect foreign taxes, but also those seeking injunctive relief designed to

enforce foreign tax laws. App. 27a; *Republic of Honduras*, 341 F.3d at 1257-59; *Attorney Gen. of Can.*, 268 F.3d at 118-19. Within the last two years, the Court twice has refused to grant certiorari in these cases to review this long-settled principle. The Court should reach the same result here.

B. There Is No Conflict That The Revenue Rule Applies To Claims For Injunctive Relief

In response to this unanimity among the circuit courts, petitioners attempt to create a conflict on the issue of equitable relief. Trying to avoid the Revenue Rule by ignoring their damages claims – the heart of their complaints – and limiting the relief sought to equitable relief, petitioners claim that there are "several conflicts" over whether the Revenue Rule applies to claims for injunctive relief. Pet. at 20-26. Not one of these purported conflicts exists. Moreover, claims for injunctive relief implicate the separation of powers concerns underlying the Revenue Rule just as much – if not more so – as claims for damages.

First, petitioners misleadingly claim that the holding below "conflicts" with the holdings of the Fourth and Ninth Circuits. Pet. at 12. However, there is no "holding" by the Fourth or Ninth Circuits regarding claims by foreign governments for injunctive relief. The cases cited by petitioners did not involve claims for injunctive relief at all. *See United States v. Pasquantino*, 336 F.3d 321, 330 (4th Cir. 2003) (en banc) (addressing federal wire fraud prosecution) (cited in Pet. at 12); *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161, 1165-66 (9th Cir. 1979) (addressing suit by foreign government to enforce tax judgment) (cited in Pet. at 12). Nor do any of the foreign cases cited by petitioners

address such relief. *See* Pet. at 12-13 (citing *In re State of Norway's Application*, 1 A.C. 723, 807-08 (H.L. 1990); *United States v. Harden*, [1963] S.C.R. 366, 372-73; *Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89, *available at* [1955] A.C. 516, 526 (Ir. H. Ct. 1950)).[6]

Second, petitioners claim that the application of the Revenue Rule to claims for injunctive relief conflicts with the Court's decision in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). *See* Pet. at 11-12. *Milwaukee County* did not involve unadjudicated tax claims by a foreign government. Rather, *Milwaukee County* stands for the unremarkable proposition that, under the Full Faith and Credit Clause, one state will enforce a tax judgment from another state. *Milwaukee County*, 296 U.S. at 277. As the Second Circuit acknowledged, *Milwaukee County* "distinguished the obligations of the states of the union from those of independent foreign sovereigns . . . which are 'free to ignore obligations created under the laws or by the judicial proceedings of the others.'" *Attorney Gen. of Can.*, 268 F.3d at 127 n.29 (quoting *Milwaukee County*, 296 U.S. at 277).

Third, petitioners claim that the denial of injunctive relief "conflicts with U.S. policy and practice." Pet. at 14. Citing a handful of cases, petitioners assert that the United States

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6. Citing these cases, petitioners claim that the Second Circuit's decision "conflicts with the decisions of the high courts of the United Kingdom, Ireland and Canada." Pet. at 12. To the contrary, not one of petitioners' foreign decisions addressed – or allowed – a claim for injunctive relief to enforce foreign tax laws. Indeed, in *Peter Buchanan*, the Irish High Court explained that, in applying the Revenue Rule, "it is not the form of the action . . . that must be considered, but the substance of the right sought to be enforced." [1955] A.C. at 527.

"routinely" seeks injunctive relief in foreign courts to address schemes to defraud the United States. Pet. at 14-15. However, *not one* of petitioners' citations involved an attempt to obtain injunctive or other equitable relief to address violation of U.S. revenue laws.[7] In its *Amicus* Brief filed with this Court in the *Canada* case, the United States expressly agreed that claims for injunctive relief, like those presented here, are barred by the Revenue Rule. U.S. *Amicus* Br. at 14 n.1. Contrary to petitioners' claim, the United States did not "declin[e] to state a view" concerning the application of the Revenue Rule to claims for injunctive relief. Pet. at 25 n.10. Rather, the United States expressly recognized that such "claims for equitable relief seek to vindicate the same interest in avoiding tax loss and increased law enforcement costs as do petitioner's claims for damages." U.S. *Amicus* Br. at 14 n.1.

Thus, as the United States recognized, claims for both damages and equitable relief seek foreign tax enforcement

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7. Most of these decisions involved SEC enforcement actions for securities fraud. *See SEC v. Shull, available at* [1999] CarswellBC 1772 (In Chambers) (securities fraud); *SEC v. Warren & Assocs., Inc.*, SEC Litigation Release No. 15468 (Sept. 2, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15468.txt; *SEC v. Dunne Finance Ltd.*, SEC Litigation Release No. 15300 (Mar. 18, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15300.txt; *SEC v. Antar*, SEC Litigation Release No. 15251 (Feb. 10, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15251.txt. One case involved telemarketing fraud. *United States v. Levy*, [1999] 45 O.R.3d 129. Another case involved the enforcement of a final civil judgment for environmental clean up costs under CERCLA. *United States v. Ivey*, [1995] 26 O.R.3d 533, *aff'd*, [1996] 30 O.R.3d 370. The final citation, *The Sapphire*, 78 U.S. (11 Wall) 164 (1870), likewise did not involve any claim for taxes or duties, but was a damages action based on a ship accident.

assistance denied by treaty, undermining the Executive Branch's treaty-making authority. The end result of petitioners' claim for injunctive relief would be to allow petitioners to circumvent specific treaty limitations on extraterritorial tax enforcement by providing greater assistance than petitioners negotiated in their treaties. Petitioners' requested injunctions "would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages." App. 27a.[8] Petitioners' request is exactly what the Revenue Rule was designed to prevent: granting a foreign government greater assistance than that which the United States was willing to provide after careful deliberation.

In short, every court to consider this issue has concluded that a plaintiff cannot evade the Revenue Rule simply by requesting injunctive relief instead of damages. App. 27a; *accord Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003). The last-minute revisions to petitioners' claims provide no basis for the Court's review.

II. There Is No Reason To Hold This Case Pending Resolution Of The Revenue Rule's Application To Federal Criminal Actions At Issue In *Pasquantino*

In another attempt to breathe life into this case, petitioners manufacture yet another non-existent "conflict" and ask the Court to hold this petition pending the Court's decision in *Pasquantino*, which allowed a federal *criminal* prosecution involving alleged foreign smuggling to proceed

8. Notably, in the decision below even Judge Calabresi, who dissented in *Canada*, agreed that the Revenue Rule applied equally to claims for injunctive relief.

in the face of a Revenue Rule challenge. Pet. at 10-11. *Pasquantino* is a categorically different case. The United States, in deciding to prosecute that case, evaluated any foreign policy implications raised by that suit. By contrast, this case – like all civil cases by private plaintiffs – does not carry the imprimatur of the foreign policy-making branches of the federal government. Accordingly, *Pasquantino* has no bearing on the present case.

Both parties in *Pasquantino* agree that the Revenue Rule bars suits like the one here – *i.e.*, civil suits brought by foreign governments seeking tax enforcement assistance. *See* Petition for Certiorari at 27-28, *United States v. Pasquantino*, 124 S. Ct. 1875 (2004) (No. 03-725); Brief for the United States in Opposition at 9-11, *United States v. Pasquantino*, 124 S. Ct. 1875 (2004) (No. 03-725) ("*Pasquantino* Opposition"). The issue raised by petitioners here, therefore, will not be presented in *Pasquantino*. In light of the Circuit Courts of Appeals' complete agreement that the Revenue Rule applies in civil cases, the Court should deny petitioners' request to hold their petition pending resolution of *Pasquantino*. *See Republic of Honduras*, 341 F.3d at 1259-60; *Attorney Gen. of Can.*, 268 F.3d at 106.

Indeed, even those courts that have refused to apply the Revenue Rule in the criminal context have recognized that entirely different considerations apply in the civil context. In *Canada*, for example, the Second Circuit held that the Revenue Rule does not apply in the criminal context but does apply in the civil context because of different separation of powers concerns. The Second Circuit explained that, when the United States prosecutes a criminal action, such an action "is subject to the oversight of the executive branch" and foreign relations interests of the United States are

"accommodated." *Attorney Gen. of Can.*, 268 F.3d at 123. By contrast, when a foreign government brings a civil action, such an action "may be, but is not necessarily, consistent with the policies and interests of the United States." *Id.* The Second Circuit in its decision below reiterated this fundamental distinction:

> [W]here the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States. . . . [E]xecutive consent may be found where the United States itself institutes a prosecution designed to punish those who have defrauded foreign governments of tax revenues.

App. 14a (quoting *Attorney Gen. of Can.*, 268 F.3d at 113, 123 n.25).

In *Pasquantino*, the Fourth Circuit similarly recognized that a criminal prosecution under a federal statute allows the "two branches of our federal government charged by our Constitution with the power to make foreign policy decisions" to pass upon any questions of foreign policy implicated by the suit. 336 F.3d at 331. The *Pasquantino* Court concluded that "prosecution for violation of the federal wire fraud statute . . . does nothing civilly . . . to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant." *Id.*

The United States also has recognized that civil actions present an "entirely different question" from the issues presented in a criminal wire fraud prosecution. *Pasquantino* Opposition at 9. The United States takes the position that federal criminal prosecutions "vindicate the interests of the United States, and they are subject to Executive Branch control." U.S. *Amicus* Br. at 16. By contrast, "a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not . . . necessarily consistent with the interests of the United States." *Id.* The United States has concluded that "the application of the revenue rule by the Second Circuit properly respects the different roles of the courts and the political branches in matters involving foreign taxes." *Id.* at 7.

In short, the Court's decision on the question presented in *Pasquantino* will not affect this case. There is no reason to hold this case pending consideration of the fundamentally different issue of the Revenue Rule's application to criminal prosecutions.

III. Petitioners' Remaining Issues Do Not Provide A Basis For This Court's Review

A. The Revenue Rule Is An Important Common Law Doctrine Supported By Constitutional Principles

Unable to establish any conflict to justify the Court's discretionary review, petitioners attack the very foundation of the Revenue Rule. Pet. at 17-19. This too fails.

As the United States explained in its *Amicus* Brief in *Canada*, the "revenue rule serves important separation-of-

powers interests that transcend the particular context of the present action by Canada." U.S. *Amicus* Brief at 6-7. Specifically, the "rule avoids involving the judiciary in making judgments about foreign tax policies and procedures and interwoven foreign policy considerations, and it leaves the Executive Branch and the Senate free to decide through the treaty-making process the extent to which exceptions to that principle should be recognized." *Id.* at 7.

The United States negotiates tax treaties with foreign governments against the backdrop of the Revenue Rule. *See Attorney Gen. of Can.*, 268 F.3d at 115-19. Allowing suits like these to proceed would completely undermine the United States's bargaining power in negotiating future tax collection assistance treaties, including its ability to obtain reciprocal rights. *See id.* at 122. For instance, the United States recently negotiated an agreement with the national Colombian government, which provides for limited information sharing on tax issues. *See* Agreement for the Exchange of Tax Information, Mar. 30, 2001, U.S.-Colom., 2001 WTD 88-16 (Tax Analysts Doc. 2001-12474). Petitioners cannot explain why the Departments – political subdivisions of the Republic of Colombia that do not have any tax treaty with the United States – should have *greater* rights to tax enforcement assistance than those the United States agreed to give the national Colombian government. Nor, for that matter, can petitioners explain why the Colombian Departments should be entitled to greater rights in American courts than the United States would receive in Colombian courts. Indeed, not one foreign

court grants the United States the tax enforcement rights petitioners seek here.[9]

Similarly, the *EC* case, if allowed to proceed, would provide the Member States with tax assistance *denied* to them by treaty. The United States has separate treaties with each of the Member States in this suit "providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here." *Attorney Gen. of Can.*, 268 F.3d at 113. These tax treaties with the Member States are not uniform, but reflect U.S. foreign policy and reciprocity considerations unique to each country. Not one of those treaties authorizes enforcement of unadjudicated tax claims in U.S. courts.[10] In the end, petitioners' proper recourse is to

9. *See, e.g.*, *QRS 1 Aps v. Frandsen*, 3 All E.R. 289 (C.A. 1999), *available at* [2000] I.L. Pr. 8, 14 (C.A.) (noting that the Revenue Rule "'is deeply embedded not only in the common law, but also in the law of civil law countries'") (citation omitted); *accord Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] A.C. 368, 428 (H.L.) ("[A]t present the international rule with regard to the non-enforcement of revenue and penal laws is absolute."); *Peter Buchanan Ltd.*, [1955] A.C. at 526 ("[T]he courts of our country will not enforce the revenue claims of a foreign country."). Indeed, the Member States themselves have executed a multilateral treaty in which they endorse and retain the Revenue Rule in their own jurisdictions. *See* European Communities: Convention On Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, art. 1, 29 I.L.M. 1413, 1418.

10. Those tax treaties and agreements – and the 51 other tax treaties entered into by the United States – overwhelmingly demonstrate the political branches' "intent[] to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Attorney Gen. of Can.*, 268 F.3d at 119; *see also id.* at 119 n.16 (Cont'd)

the political branches or their own courts. *See id.* at 135. What they cannot do is bring these foreign tax claims in U.S. courts.

Petitioners recently filed a Supplemental Brief bringing the Framework Convention on Tobacco Control ("FCTC") to the Court's attention. Petitioners argue that the FCTC "provides compelling new evidence – unavailable to the Court of Appeals – that the Executive Branch expressly favors broad 'cooperation' with foreign States in connection with 'proceedings' initiated by foreign States to eliminate cigarette smuggling." Pet'rs Supplemental Br. at 2. Petitioners misstate both the record below and the import of the FCTC.

First, contrary to petitioners' assertion, the FCTC demonstrates the United States's continued adherence to the Revenue Rule. In negotiations on the FCTC, the U.S. delegation objected to a draft provision that would have imposed extraterritorial liability for duties and taxes.[11]

(Cont'd)
(collecting treaties). The Second Circuit properly rejected petitioners' reliance on various non-tax treaties, such as the Vienna Convention and Palermo Convention. *See* App. 27a n.7. Petitioners blatantly misstate the text of these non-tax treaties. Pet. at 17-19. Nowhere do these treaties expressly or implicitly address, mention, or relate to extraterritorial tax enforcement.

11. *Compare* Framework Convention Alliance Briefing Papers INB3, *Smuggling-Related Provisions of the FCTC: Recommended Text* § J, *at* http://fctc.org/about_FCTC/INB3/INB3brief_smuggle.pdf (Oct. 5, 2001), *with* Minority Staff, Committee on Government Reform, U.S. House of Representatives, *U.S. Positions on Selected Issues at the Third Negotiating Session of the Framework Convention on Tobacco Control* Addendum A, *at* http://www.house.gov/reform/min/pdfs/pdf_inves/ pdf_tobacco_accord_positions_rep.pdf (Mar. 5, 2002).

The objectionable provision was not included in the final treaty.[12] Rather – consistent with most U.S. tax treaties – the final text only provides for information exchange among government agencies. *See* FCTC arts. 15(4)(a), 15(6), *at* http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf.

Second, the FCTC is not yet in force. Although the United States signed the FCTC on May 10, 2004, the treaty remains unratified and has not been submitted to the Senate. *See SEC v. Int'l Swiss Invs. Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990) ("An unratified treaty has no force until ratified by a two-thirds vote of the Senate."); *see also* Press Release, U.S. Dep't Health & Human Servs., *United States Signs Tobacco Control Treaty*, *available at* http://www.hhs.gov/news/press/2004pres/20040511.html (May 11, 2004) (noting FCTC will not be submitted to Senate until after completion of interagency review) (Pet'rs Supplemental Br. at 4a).

Finally, there is nothing "new" about the FCTC. *Cf.* Pet'rs Supplemental Br. at 2, 4. The FCTC was raised in the proceedings below, and discussed in the parties' briefs. *See* Brief for Defendants-Appellees at 56, *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Nos. 02-7330, 02-7325); Brief of the World Health Organization As *Amicus Curiae* In Support of the Position of the European Community and the Member States and Reversal of the Judgment of the District Court at 10-11, *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Nos. 02-7330, 02-7325). For the reasons noted above, the Second Circuit properly rejected petitioners' interpretation of the FCTC, and remand on this issue is wholly unnecessary.

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12. *See* WHO Framework Convention on Tobacco Control ("FCTC"), May 21, 2003, arts. 15 & 19, *at* http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf (last visited June 14, 2004).

B. Petitioners' Remaining Criticisms Of The Second Circuit's Decision Provide No Basis For The Court's Review

Petitioners' remaining criticisms of the Second Circuit's opinion also do not survive scrutiny.

First, petitioners claim that the Second Circuit erred on whether the Revenue Rule is a jurisdictional or discretionary doctrine. Pet. at 23-24. Petitioners misstate the Second Circuit's ruling. The Second Circuit did not hold that "the revenue rule is a mandatory doctrine that divests the courts of the power and discretion to enjoin or remedy a smuggling scheme." Pet. at 24. In fact, the court held the opposite, recognizing that "the revenue rule is . . . not absolute." App. 27a n.7. The court explained that "the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present." App. 27a n.7. But, "once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated." App. 28a.

Second, petitioners claim that the decision below ignored foreign governments' general "access to [American] courts." Pet. at 18-19. The Second Circuit in fact expressly acknowledged that "foreign sovereigns have long had access to United States courts, and may sue for violation of domestic laws." App. 24a n.7. However, the Revenue Rule represents a well-established exception. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002). It is for this reason that the courts have looked to tax treaties, rather than treaties providing general access

to courts, to determine the continued viability of the Rule. *See* App. 24a n.7 (noting that treaties cited by petitioners "are not particularly relevant").

In any event, petitioners' alleged desire to permit "U.S. allies" (Pet. at 18) access to our courts to vindicate foreign revenue laws only underscores the need to leave such decisions to the political branches. To allow courts to decide which foreign government is an "ally" and which is not (or which foreign revenue laws deserve enforcement and which do not) would interject the judiciary into ongoing treaty negotiations and sensitive diplomatic issues better left to the political branches.[13]

Finally, petitioners claim that the Second Circuit itself violated separation of powers principles by suggesting that whether or not the judiciary will apply the Revenue Rule depends on whether the Executive Branch has "express[ed] its 'consent or approval.'" Pet. at 25 (citation omitted). Petitioners argue that this suggestion conflicts with various

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13. Relying on a Third Circuit decision from 1810, petitioners suggest that the Revenue Rule does not apply to common law claims. Pet. at 16-17 (citing *King of Spain v. Oliver*, 14 F. Cas. 571 (C.C.D. Pa. 1816) (No. 7,812). As this Court explained, however, *King of Spain* "was not founded upon [foreign tax] laws, or brought against a person who had broken them," but was a breach of contract action. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888), *overruled on other grounds by Milwaukee County*, 296 U.S. 268. *King of Spain* stands for nothing more than the general rule that "foreign States may sue private parties in the federal courts." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 n.2 (1934) (citing *King of Spain*, 14 F. Cas. 571). Courts have not hesitated to apply the Revenue Rule to state common law claims when the Rule was otherwise applicable. *See Republic of Honduras*, 341 F.3d 1253.

opinions in *First National City Bank v. Banco National de Cuba*, 406 U.S. 759 (1972). As an initial matter, as the petition itself makes clear, there is no holding in *First National City Bank* that a federal court may never consider the position of the Executive Branch in deciding how to proceed in a case that presents foreign policy issues. Indeed, U.S. courts often solicit the views of the Executive Branch on matters touching on foreign affairs. Nor did the Second Circuit hold, as petitioners suggest, how the political branches must express consent before a U.S. court may resolve a claim touching on foreign tax matters. Such an issue simply was not presented by this case, where neither Congress nor the Executive Branch has communicated *in any way* its support for this suit. To the contrary, the Executive Branch has done nothing to indicate any change of position from the one expressed to the Court in *Canada*, *i.e.*, that claims of this nature are and should be barred by the Revenue Rule. Accordingly, petitioners' reliance on *First National City Bank* provides no basis for the Court's review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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